

F. (No. 14)

v.

EPO

137th Session

Judgment No. 4789

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourteenth complaint filed by Mr S. C. F. against the European Patent Organisation (EPO) on 6 March 2018, the EPO's reply of 3 July 2018, the complainant's rejoinder of 16 August 2018 and the EPO's surrejoinder of 3 December 2018;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant challenges his appraisal report for 2016.

Facts relevant to this case can be found in Judgment 4726, delivered in public on 7 July 2023, concerning the complainant's seventh complaint. Suffice it to recall that the complainant has been a permanent employee of the European Patent Office, the EPO's secretariat, since 1987. At the material time, he was working as an examiner, but was released from his official duties on a 50 per cent basis for staff representation activities. As from 1 January 2016, he was reassigned to Directorate 1503.

On 4 March 2016, the complainant formally objected to the objectives set for him for 2016, arguing that there were "objectively justified reasons to suspect partiality of [his] reporting and countersigning officers" and "[expressing the] wish that undue attacks on [his] dignity

eventually [came] to an end, and that illegitimate interferences into the responsibilities vested by the [EPO] Contracting States directly in the Divisions of which [he was] a member [were] not repeated". On 23 March, the countersigning officer observed that the complainant had been working under the authority of Director 1503 – that is, the reporting officer – for only two and a half months and that there were no reasons to suspect bias from the parties involved in the reporting process. The objectives set for 2016 were confirmed.

During the intermediate review meeting held on 21 July 2016, the complainant was informed by his reporting officer that his productivity was below what could be expected from him. A second review meeting was held on 8 December 2016. In his appraisal report for the period from 1 January 2016 to 31 December 2016, his overall performance was assessed as “acceptable, with some areas of improvement, which [had] been addressed with [him]”. As the complainant disagreed with the assessment of his performance, a conciliation meeting took place on 22 March 2017, following which the report was confirmed. On 24 March, he raised an objection with the Appraisals Committee reiterating his main argument that the report was “an illegitimate interference into the responsibilities of the examining [D]ivisions since it [led] to objectively justified suspicion[s] of partiality”.

In its opinion of 11 October 2017, the Appraisals Committee recommended that the complainant’s objection be rejected and that his appraisal report for 2016, which in its view was neither arbitrary nor discriminatory, be confirmed. By a letter dated 8 December 2017, the complainant was informed that the Vice-President of Directorate-General 4 (DG4) had decided to follow those recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to declare that the Appraisals Committee’s opinion and his 2016 appraisal report are null and void. He requests that these documents be removed from his personal file. He seeks compensation for procedural violations, moral damages, costs and interest on all amounts due. On a subsidiary basis, he asks the Tribunal to declare the whole appraisal procedure as null and void *ab initio*, to remit his case

to the EPO for an examination involving impartial reporting and countersigning officers and/or a duly composed Appraisals Committee or Internal Appeals Committee as the Tribunal sees fit, and to award him 4,000 euros in compensation for the procedural delays and violations, and costs.

The EPO requests the Tribunal to dismiss the complaint as unfounded in its entirety.

In his rejoinder, the complainant asks the Tribunal to refer the case back to the EPO for a “fresh appraisal”, which should include “an oral hearing of [him] and [of] the witnesses”.

In its surrejoinder, the EPO argues that, as such an order would amount to an injunction, this new claim is irreceivable.

CONSIDERATIONS

1. In challenging the impugned decision and his 2016 appraisal report on procedural and substantive grounds, the complainant asks the Tribunal to:

- (1) set aside the impugned decision;
- (2) join this complaint with various other complaints he has filed with the Tribunal;
- (3) declare that the Appraisals Committee’s opinion is null and void;
- (4) declare that his 2016 appraisal report is null and void;
- (5) order the EPO to remove the subject appraisal report and the Appraisals Committee’s opinion from his personal file;
- (6) award him moral damages, which he quantifies in his rejoinder to be 1,000 euros per month until the disputed documents are removed from his personal file;
- (7) award him compensation in the amount of 2,000 euros for procedural violations; and
- (8) award him compound interest of 6 per cent on all amounts due.

On a subsidiary basis, he asks the Tribunal to:

- (a) set aside the impugned decision;
- (b) declare that the opinion of the Appraisals Committee is null and void;
- (c) declare that the whole appraisal procedure is null and void *ab initio*, including the appraisal report;
- (d) send the case back to the EPO for an examination involving impartial reporting and countersigning officers and/or a duly composed Appraisals Committee or Internal Appeals Committee as the Tribunal sees fit, in particular without any of the officers who have so far been involved in the procedure;
- (e) award him compensation in the amount of 4,000 euros for the procedural delays and violations; and
- (f) award him costs.

In his rejoinder, he further requests that the case be remitted to the EPO for a “fresh appraisal” which should include “an oral hearing of [him] and [of] the witnesses”.

2. In the complaint form, the complainant highlights the box which signifies that he wants oral proceedings to be held pursuant to Article 12, paragraph 1, of the Tribunal’s Rules. That request is rejected as the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow it to make a properly informed determination of the issues raised in this complaint. The complainant’s request in item (2) for the joinder of this complaint with various other complaints is also rejected as they do not raise the same or even similar issues of fact and law. Concerning more particularly the request for a joinder with his seventh complaint, it is moot since the latter was the subject of Judgment 4726, delivered in public on 7 July 2023.

3. The complainant’s requests in items (3) and (b) to declare the Appraisals Committee’s opinion null and void are irreceivable as, in itself, that opinion was merely a preparatory step in the process of

reaching the final decision, which the complainant impugns. Established precedent has it that such an advisory opinion does not in itself constitute a decision causing injury which may be impugned before the Tribunal (see, for example, Judgments 4721, consideration 7, and 4637, consideration 5).

4. The EPO further submits, without explicitly raising irreceivability as a threshold issue, that the complainant's focus on the disagreements between him and his management over a period of time, rather than on the report itself, is an attempt to broaden the scope of the complaint. The EPO argues that the complainant thereby suggests that he does not intend to challenge his 2016 appraisal report itself but intends to embark upon a broader discussion regarding his ongoing disagreements with his management upon which he cannot depend to prove that his 2016 appraisal report was unlawfully established. The EPO states that it is a strategy to have the Tribunal adjudicate upon the status of examiners and that this is beyond the Tribunal's competence to adjudicate patent law matters. It is however clear that the complainant relies on the disagreements with the EPO's management, including with his reporting and countersigning officers, to support his case that his 2016 appraisal report was procedurally and substantively tainted because of circumstances which raises, in his views, suspicions of partiality or bias by the officers who established that report. However, there is no support in the Service Regulations for permanent employees of the European Patent Office or in the case law for the complainant's statement, in response to the EPO's submissions, that the Tribunal has jurisdiction to adjudicate on invoked inconsistencies between the terms of employment derivable from the European Patent Convention and the Service Regulations, including on the suspicions of bias. Quite on the contrary, the Tribunal has already ruled on the issue by asserting that, generally, decisions with respect to the law and/or procedures applicable to patent applications do not affect a staff member's relationship with the Organisation (see, for example, Judgments 4417, considerations 7 and 8, and 3053, consideration 11).

5. Since the provisions applicable to this complaint are the same as those cited in Judgment 4786, also delivered in public this day, the Tribunal refers to considerations 2 and 3 of that judgment which contain those provisions, making it unnecessary to reproduce them in the present judgment.

6. As the complainant challenges the impugned decision on procedural and substantive grounds, the Tribunal recalls the following statement which it made in Judgment 4564, considerations 2 and 3, concerning the limited power of review that it exercises in the matter of staff appraisals:

“2. [...] It is not for the Tribunal, whose role is not to supplant the administrative authorities of an international organisation, to conduct an assessment of an employee’s merits instead of the competent reporting officer or the various supervisors and appeals bodies which may be called upon to revise that assessment. [...]

3. [...] [A]ssessment of an employee’s merit during a specified period involves a value judgement; for this reason, the Tribunal must recognise the discretionary authority of the bodies responsible for conducting such an assessment. Of course, it must ascertain whether the ratings given to the employee have been determined in full conformity with the rules, but it cannot substitute its own opinion for the assessment made by these bodies of the qualities, performance and conduct of the person concerned. The Tribunal will therefore intervene only if the staff report was drawn up without authority or in breach of a rule of form or procedure, if it was based on an error of law or fact, if a material fact was overlooked, if a plainly wrong conclusion was drawn from the facts, or if there was abuse of authority.”

7. As the submissions the complainant proffers to support his challenge to the establishment of his 2016 appraisal report on procedural grounds are essentially similar to those he proffered in his seventh complaint, in which he challenged his 2015 appraisal report, and which the Tribunal rejected in consideration 9 of Judgment 4726 as unfounded, they are also rejected as unfounded in this complaint.

8. Regarding his challenge to his 2016 appraisal report on the merits, the complainant submits that the Appraisals Committee did not deal in substance with his arguments on suspicions of bias and failed to

substantiate its opinion. Contrary to this latter submission, the Tribunal determines that the Committee sufficiently substantiated its opinion within the scope of its mandate under Article 110a(4) of the Service Regulations. It set out the essential facts; noted the objections the complainant raised; provided preliminary remarks in which it recalled its mandate under Article 110a(4), as well as the wide discretion the case law confers upon a reporting officer; set out the relief that was available to the complainant in the conciliation procedure; mentioned the need for the complainant to substantiate his case to show that the appraisal report was arbitrary or discriminatory; and underlined the fact that a staff member has no entitlement to any specific rating. In assessing the case, the Appraisals Committee concluded, among other things, that the reporting officer's assessment seemed to be based on objective elements, such as the achievement of the set objectives, also having regard to the complainant's seniority, his experience and grade, and the expected competencies. The Committee also stated that the reason for the overall performance rating given was explained to the complainant during the conciliation meeting; that his arguments for contesting that rating reflected more a relative and subjective divergence of views rather than an actual flaw in the assessment of his performance; and that he provided no convincing evidence nor argument to prove that the assessment was arbitrary or discriminatory.

9. The complainant first alleged suspicions of partiality against his reporting and countersigning officers in his comments of 4 March 2016 at the objectives setting stage of the 2016 appraisal period. He repeated that allegation in the conciliation procedure and in his final comments in his appraisal report, dated 24 March 2017. He based that allegation on several disputes he has had with the EPO and decisions which, he said, were taken over a period of time from 2012 concerning "illegitimate interferences" with his responsibilities vested by the Contracting States in his Division, among others, in which he has stated that his reporting and countersigning officers were involved. He has raised essentially the same allegation on the same bases in other complaints he has filed with the Tribunal. Each of those other complaints challenges aspects of the interferences or decisions upon which he

relied in challenging his 2015 appraisal report and some of those complaints have been resolved in judgments by this Tribunal. He nevertheless repeats them in this complaint.

10. In consideration 12 of Judgment 4726 on his seventh complaint, in which his challenge to his 2015 appraisal report was considered, the Tribunal noted that, on analysing the evidence the complainant proffered to support his allegation of partiality, the Appraisals Committee had concluded that he did not provide sufficient evidence to substantiate it. The Tribunal concluded that it was satisfied that that conclusion was open to the Appraisals Committee. In light of this conclusion, the fact that the countersigning officer for the complainant's 2015 and 2016 appraisal reports was the same person, as well as the fact that the complainant's allegation of partiality against him and the supporting evidence challenging his 2015 and 2016 reports are essentially the same, the allegation of partiality against the countersigning officer in the context of his 2016 performance appraisal clearly does not meet the threshold required, for example, in Judgment 4638, consideration 13, to sustain a successful plea of partiality against that officer.

11. The complainant made the same allegation of partiality against the reporting officer notwithstanding that he (the complainant) was reassigned to Directorate 1503 from 1 January 2016 and his reporting officer only assumed supervision of his work from around that time. The reporting officer was not involved in establishing his 2016 appraisal report. However, the complainant alleges that his reporting officer was also involved in decisions that interfered with his responsibilities as an examiner. He provides no explanation, except that the reporting officer acted within the hierarchical line of the Vice-President of Directorate-General 1 and thus had to follow his orders at least since 2012. The allegation of partiality against the reporting officer clearly does not meet the threshold required, for example, in Judgment 4638, consideration 13, to sustain a successful plea of partiality against that officer. In the foregoing premises, the complainant's challenge to his 2016 appraisal report on the allegation of partiality is unfounded.

12. The complainant provides no convincing proof of circumstances falling within the scope of the Tribunal's limited power of review. The Tribunal agrees with the Appraisals Committee that he has not provided any evidence or arguments proving that his appraisal report was arbitrary or discriminatory. The Vice-President of Directorate-General 4 therefore correctly accepted this conclusion in the impugned decision.

13. In the foregoing premises, the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

CLÉMENT GASCON

MIRKA DREGER